

BROWARD COUNTY BAR ASSOCIATION BARRISTER

MARCH 2019

2019 RAISING THE BAR

BCBA FAMILY LAW SECTION

FRIDAY, APRIL 5TH

Topics Include:

- Local Rules and Procedures - Tri County
- A View from the Family Law Bench and Pet Peeves
- Collaborative Family Law
- *Advance Topic - Trial Skills
(Direct and Cross Examination of a Witness)
- *Advance Topic - Presenting Evidence at Trial
(Laying the Proper Foundation)

...and more

See Inside on page 14.



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ON THE COVER

The BCBA Family Law Section will host its annual Raising the Bar seminar on Friday, April 5, 2019 at the Bahia Mar in Fort Lauderdale Beach - DoubleTree. Section Co-chairs, Stephanie Matalon (pictured left) and Kemie King Lindsey (pictured right) have organized a great program that is designed for new and experienced family law attorneys. For more information see page 14.

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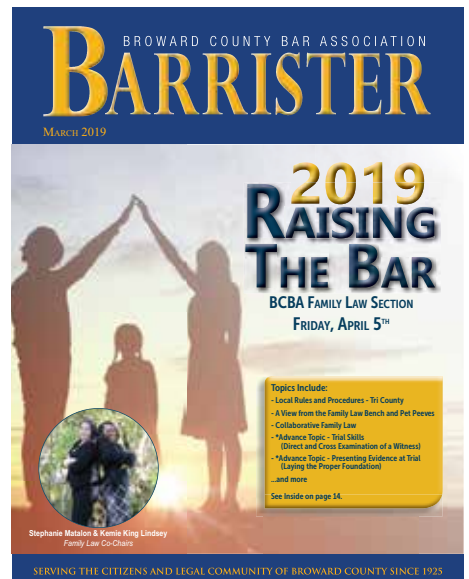
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Stephanie Matalon & Kemie King Lindsey
Family Law Co-Chairs

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Edwina V. Kessler

On the 8th day of March, 2019, the Broward County Bar Association (“BCBA”) in partnership with the Seventeenth Judicial Circuit and The Broward County Women Lawyers’ Association will be celebrating its first Women’s History Month and International Women’s Day. We will be honoring the women pioneers of the Broward County legal community. As a practicing attorney in Broward County for 24 years, I have been fortunate enough to know many of these pioneers. Whether it was through the Stephan Booher Inns of Court that I joined while in law school, litigating in front or through my practice or through the BCBA, all of these women have lead by example.

When I graduated law school 24 years ago 50% of our class was women. However, when I would go to Motion Calendar many times I would be the only female litigator in chambers. As a member of the Young Lawyers Association we always had a few women on the board; with many becoming president of the Young Lawyers. When I was elected to the “Big Board of Directors” the large majority of the directors were men. I am happy to say times are changing. There have been 93 presidents of the Broward County Bar Association and I am the 9th woman president. Since I joined the BCBA there have been 7 female presidents. Our current Board of Directors nine out of twenty-three of the directors are women. In 2022 and 2023 there will be two more women presidents with Jamie Finizio-Bascombe our current secretary and Alison Smith who will become secretary in July. Within the last five years, I have noticed more women attorneys at Motion Calendar and at depositions.

My first job out of law school was working at a firm with my father and two sisters Paula and Andrea. I was fortunate to be mentored by my sisters on how to be argumentative with class and grace. They expressed the importance of joining the BCBA and becoming involved within the Broward legal community. Although my father’s advice and teachings are still instilled in me, having sisters in your profession that at the time was dominated by men is irreplaceable. They have always been there to provide advice and encouragement. I was never intimidated to ask any questions, not even ones I knew were probably easy. Although Andrea is no longer with us, I still bounce questions, legal arguments, or just vent about another attorney with Paula.

Some upcoming events to look forward are the the Judicial Jaunt Series with The Honorable Sandra Perlman on Friday, March 15th at noon, the Family Law Section “Raising the Bar”, which will take place on the 5th day of April, 2019, from 8:30am to 5:00pm at the Bahia Mar on Fort Lauderdale Beach. Some of the topics include: discussing the local rules and procedures, tax deductions and business valuations, a view from the family law bench and pet peeves, how to preserve your appellate record, and a legislative update. This event normally sells out; therefore, I would suggest you reserve your spot as soon as possible. Save the date for the Law Day that will be held on the 3rd day of May, 2019, at the Bahia Mar on Fort Lauderdale Beach. Our annual installation gala dinner, which will be held on the 22nd day of June, 2019, at Pier 66. This year’s theme will be James Bond so, start your planning now! **B**

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letter from the young lawyers' president



Brent M. Reitman

Coming into my term as President of the Young Lawyers Section – I experienced palpable anxiety wondering how we would be able to continue in our vigorous schedule of events for the benefit of our members. Having nearly survived my full term – I am pleased to report: “it wasn’t that bad.”

I will be the first to admit that none of the credit for that is owed to me.

Firstly – I am blessed to have an incredible Board of Directors and the support of the Braulio and the wonderful BCBA staff. Without whom, nothing would get done.

However – one of the reasons that we have had another successful year of programming the incredible support and involvement of our judiciary.

For the YLS’ first ever LAW LAPALOOZA event that took place in December of 2018, our county’s judiciary made this event and overwhelming success. An overwhelming amount of Circuit and County Judges judiciary took time out of their active dockets to come and speak to a large number of young lawyers on a wide variety of substantive and ethical topics in the legal field which made the event an overwhelming success.

In January of this year, we held our first Breakfast with the Judiciary. The event takes place as first thing in the morning in the Courthouse library. Although the event was well attended by young lawyers – I was speechless with the support that our judiciary lent us. Our judicial guests showed up in full force to support the Young Lawyers Section and even outnumbered our non-judicial attendees! It was so nice having the vast majority of our recently elected and appointed members of the judiciary present that were willing and eager to introduce themselves to Young Lawyers.

In February, we held our annual Holiday in February – a wonderful event where the Young Lawyers Section, in conjunction with the Heart Gallery, take over the Museum of Science and Discovery for a holiday party for the benefit of a number of foster children. We provide a day of museum exploration, games, and gifts – followed by a pizza party. This event is usually a monumental undertaking. Luckily, we were aided, again, by our judiciary as Judge Robert Diaz and his family assisted our efforts in wrapping gifts for children – and he and Judge Tarlika Nunez-Navarro were present first thing on Saturday morning to help set up the event and show the children a wonderful time.

Having members of the judiciary who are so invested in our community and who are constantly engaged and excited to help educate and mentor young lawyers in our community is truly rewarding and praiseworthy.

For that reason, I hope that you will join the Young Lawyers Section on April 18, 2019 for our annual Judicial Reception at the Museum of Science and Discovery. This is our largest event of the year and is designed to honor and give praise to the amazing members of our judiciary who constantly and actively support our community. We are so pleased to be able to recognize the amazing judges of our circuit – not only for their skill, integrity, and dedication inside the courtroom – but also for their time, energy, and efforts that they provide to our community outside the courtroom as well. Thank you all. **B**



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New Rule of Appellate Procedure Allows Review of Orders on Disqualification of Counsel

by Morgan Weinstein and Alexis Fields

On January 1, 2019, a host of amendments to the Florida Rules of Appellate Procedure took effect. A number of these changes concern timing, due in large part to the recent amendment of Rule 2.516, Florida Rules of Judicial Administration. Other rule changes include substantive amendments to appellate practice.¹

Amongst these rule changes, one amendment will alter the landscape of a niche source of appellate actions: motions to disqualify counsel.² Rule 9.130(a)(3)(E), Florida Rules of Appellate Procedure, now permits appeals of nonfinal orders that grant or deny a motion to disqualify counsel. Rule 9.130(a)(3)(E) provides that “[a]ppeals to the district courts of appeal of nonfinal orders” include those that “grant or deny a motion to disqualify counsel.” Review of orders granting or denying such motions had not traditionally been subject to automatic appellate jurisdiction during the pendency of a lower court case.

Prior to the January 1, 2019 amendment, a writ of certiorari was the appropriate vehicle to seek review of an order granting or denying a motion to disqualify counsel.³ To establish certiorari jurisdiction, a petitioner had to establish (1) a departure from the essential requirements of the law; (2) material injury resulting therefrom; and (3) that

such injury could not be corrected on post-judgment appeal.⁴ Elements two and three were jurisdictional; only after a petitioner had demonstrated a material injury which cannot be corrected on direct appeal could the petitioner then attempt to convince a court that such injury stemmed from a departure from the essential requirements of law.⁵ In other words, relative to a direct appeal of an appealable, nonfinal order, certiorari review presented a high bar for petitioners.⁶

With the recent amendment to Fla. R. App. P. 9.130, in creating Fla. R. App. P. 9.130(a)(3)(E), the Florida Supreme Court has expanded the categories of appealable nonfinal orders. The denial of a party to counsel of his or her choice had already been presumed a material injury that could not be corrected on direct appeal. Nevertheless, the addition of orders that grant or deny a motion to disqualify counsel to the enumerated list found at rule 9.130(a)(3) presents serious implications for review of such orders. First, jurisdiction is now presumed and automatic. Second, an appellant need only present a legal error, and need not pass the high hurdle of demonstrating a departure from the essential requirements of law. Given this new landscape, appellants may see more success in challenging orders on motions to disqualify counsel and may be more likely to

engage in interlocutory practice for review of such orders. **B**

¹ See, e.g., Fla. R. App. P. 9.110(k); Fla. R. App. P. 9.210.

² In re Amendments to the Fla. Rules of Appellate Procedure-2017 Regular-Cycle Report, 2018 Fla. LEXIS 2051, 2018 WL 5289449, No. SC17-152, at * 7 (Fla. Oct. 25, 2018).

³ See *Quality Air Conditioning Co. v. Vrastil*, 89 So. 2d 1236, 1237 (Fla. 4th DCA 2005) (discussing the validity of certiorari relief in cases involving questions of disqualification of trial counsel). See also *Canta v. Philip Morris United States, Inc.*, 245 So. 3d 813, 818 (Fla. 3d DCA 2017) (explaining, “Certiorari is the proper method to obtain review of a disqualification order because denying a party counsel of his or her choice is a material injury without appellate remedy”) (internal quotations omitted).

⁴ *Parkway Bank v. Fort Myers Amature Works, Inc.*, 658 So. 2d 646, 648 (Fla. 2d DCA 1995).

⁵ *Williams v. Oken*, 62 So. 3d 1129, 1132 (Fla. 2011) (citing *Haines City Cmty. Dev. v. Heggs*, 658 So. 2d 523, 527 (Fla. 1995); *Parkway Bank*, 658 So. 2d at 648-49).

⁶ See *Elsner v. E-Commerce Coffee Club*, 126 So. 3d 1261, 1263 (Fla. 4th DCA 2013).

See *Canta*, 245 So. 3d at 818.



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Mr. Weinstein and Ms. Fields are co-chairs of the Appellate Practice Section of the Broward County Bar Association.

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The Interconnectedness Between Bar Service and A Successful Legal Practice

by Eugene Pettis

At some point in all lawyers' careers they ask two questions. First, how can they establish a more effective network? Secondly, how can they strengthen their legal practice? While everyone's journey is different, one tried and proven path to success is engagement in bar activities.

I am often asked which came first, my reputation as a lawyer or my elevation to presidency of The Florida Bar. In truth, they are inextricably connected and were enhanced by each other. A positive reputation is a foundational principle to each achievement, a path to a successful career involves engaging in activities that also strengthen one's reputation.

There are few activities in our profession that bring together more essential elements of success than bar engagement. Whether on a local, state or national level, bar activities provide a one-stop destination with the following opportunities:

1. Enhanced Knowledge. There are bar committees and task forces that address rules, subject matter issues of our profession, legislative reviews and community enhancement. For those engaged in these types of matters, involvement gives first-hand knowledge of critical issues that make a more knowledgeable lawyer seen as a thought leader or problem solver. The Florida Bar has 21 practice sections that provide cutting edge analysis and updates on current topics.

2. Networking. There are voluntary bar associations that cover every interest and demographic. Young Lawyer's Division is an excellent organization for lawyers under 35 years old or less than five years in the practice. Besides the rich diversity of opportunities to meet other lawyers, there is also interaction with prospective clients and the opportunity to establish referral partners. People do business with those that they are comfortable with and those that have gold reputations.

3. Interface with Judiciary. No matter the practice area, every lawyer's business is impacted by judicial opinions; even for those only occasionally in court their practice is guided by the law. Our judiciary has a long history of attending and speaking at bar meetings and offering valuable insights of practice and procedure from their perspective. This is priceless even for the most seasoned practitioner. There are also opportunities to serve on joint committees, task forces and panels with judges. Not only does this acquaint lawyers with the judiciary, but it also raises one's profile within our profession.

4. Community Good. Our industry has a creed of professionalism. It speaks of "furthering our profession's devotion to public service and to the public good." A successful business should be seen as a good community partner. Bar service offers countless programs that do tremendous service in so many areas of public need. Getting engaged in communi-

ty service better connects one to the greater community and establishes that lawyer as a community servant; that's organic branding.

5. Relevancy. There is relevancy in bar service. Some activities may or may not be material in our professional endeavors. However, bar service provides activities and information that others in a firm or professional circle may be interested in. For those with a firm, odds are that the work done on a bar committee or in a bar organization can be a part of the firm's dialogue and potentially enhance the overall practice.

Whatever measure of success I have enjoyed, I credit a significant portion to my early decision to get engaged with our bar associations, starting with the T.J. Reddick Bar Association where I served two terms as president from 1988-89. All of those years gave me a feeling of belonging and paved the path for all that followed. While I cannot isolate exactly which was most impactful, what I do know is that my reputation grows my legal practice and my legal practice enhances my reputation. **B**



Eugene Pettis is co-founder of Haliczzer Pettis & Schwamm. He leads the trial practice and has more than 30 years of experience handling complex cases in medical malpractice, personal injury and professional liability. He can be reached at EPettis@hpslegal.com

The Source on Outsourcing: Why Legal Outsourcing Makes Cents

by Krysten A. Patel

How many minutes a day do you spend in your office? Of those minutes, how many are spent checking emails, taking telephone calls, meeting clients, and speaking to colleagues? If you are hoping for a “9-to-5” schedule, the number of office minutes left dedicated for thorough legal research and motion drafting is almost nil.

Between depositions, client meetings, networking, court appearances, travel time, mediations, e-mails, telephone calls, and other ancillary legal tasks - it is almost impossible for modern day litigators to devote adequate time and attention to research and drafting.

Outsourcing of legal research and drafting work to a third-party service (“TPS”) is a recent trend in the legal community that has extensive benefits to busy litigators. However, many attorneys refrain from utilizing this helpful tool, due to misplaced concerns about the ethical implications. This article addresses five common ethical questions and concerns that come with hiring a TPS.

- 1. Fee Sharing:**¹ The TPS usually charges an hourly rate. As long as the hourly rate is reasonable and the number of hours billed to complete the task is appropriate – there are absolutely no ethical implications of engaging and paying the TPS.
- 2. Attorney-Client Privilege:**² The TPS should rarely require any in-

formation apart from what is readily accessible through the online court docket (i.e., complaint, answer, counter-claims, etc.). However, in the rare case that additional information is required Florida law expressly permits sharing of “confidential information”: (1) to persons who will render legal services to the client; or (2) if sharing is in the best interest of the client. As such, hiring the TPS and sharing necessary information for the preparation of motions and pleadings does not run afoul of privilege or ethical rules.

- 3. Involvement of Client:**³ So long as the TPS is competent and the hiring attorney reviews the work-product for accuracy – there are no ethical implications of involving the TPS without client involvement or consent.
- 4. Unauthorized Practice of Law:**⁴ The TPS is almost always a licensed attorney; however, the hiring attorney should confirm with the TPS prior to engaging work. Regardless, the TPS will not sign any pleadings, motions, legal documents, or give “legal advice,” and accordingly, the rules against the unauthorized practice of law are inapplicable. As such, hiring the TPS does not implicate UPL.
- 5. Conflict of Interest:**⁵ The TPS is not undertaking to represent the client nor associated in the firm representing the client. Provided that the hiring attorney discusses potential conflicts with the TPS to ensure proper procedures and safe-

guards – conflicts of interest will be avoided.

Outsourcing is a cost-saving, time-saving, and potentially case-saving tool to assist busy litigators in obtaining work-life balance, while submitting legally accurate, well researched, and comprehensive pleadings and motions to the Court. The only question left is: what are you waiting for? **B**

¹ See Fla. R. Prof. Conduct 4-1.5(g) (explaining that lawyers who are not associated in the same law firm may share a fee only if the total fee is reasonable and either: (a) the division is proportionate to the services performed by each lawyer; or (b) the client has agreed in writing to the joint representation).

² See Fla. R. Prof. Conduct 4-1.6 (setting forth attorney’s responsibility to maintain confidentiality of client information); Fla. Stat. § 90.502 (2018) (codifying the attorney-client privilege).

³ See Fla. R. Prof. Conduct 4.1-1 (stating that a lawyer must provide competent representation).

⁴ See Fla. R. Prof. Conduct 4-5.5 (prohibiting a lawyer from committing unauthorized practice of law).

⁵ See Fla. R. Prof. Conduct 4-1.7 (prohibiting representation that implicates a conflict of interest).



Krysten A. Patel, Esq. is Founder & Lead Counsel of Motiondrafting.com. Motiondrafting.com provides legal research and writing services to busy litigators. Krysten can be contacted at: kap@motiondrafting.com.

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RAISING YOUR LEVEL OF PRACTICE WITH RAISING THE BAR



Advanced Trial Litigation course at the 2018 Raising the Bar Seminar



Professionalism Panel during the 2018 Raising the Bar Seminar

by Stephanie Matalon


As a family law practitioner, like most attorneys, I am always looking for ways to refine my skills, and brush up on changes in the law. After all, the only constant in life is change, and the law is no exception. This is especially true in family law, not only are there changes in the substantive law, in procedure, and technology, but there are also changes in society all of which affect our practice. Continuing your legal education is vital to a successful practice.

If you are an attorney looking to refine your family law skills and learn about the recent changes affecting this area of practice, look no further than the Raising the Bar seminar. As one of the co-chairs of the Family Law Section I am excited to be hosting our annual Raising the Bar Seminar on April 5, 2019. While there are multiple ways to earn your continuing legal education credits there are huge benefits to attending live seminars like Raising the Bar.

Raising the Bar offers a good mix of professional and personal activity, not only can you learn vital skills to help

you in your practice, but there are also great opportunities to connect with other attorneys and experts, catch up with friends and connect with potential mentors and mentees. It is also an opportunity to mingle with the judiciary, especially all of the new judges on the family law bench. Live seminars like Raising the Bar are a great place to hash-out, refine, and bounce ideas off of other attorneys and experts. We all have that case, or maybe two or three that has us stuck in a fog, and where we could use the advice, fresh ideas, thoughts and perspective from others.

Raising the Bar has something for everyone, it is designed for attorneys new to the practice of family law and also the experienced family law attorney. It is one of the premier family law events in South Florida because we bring you all of the topics trending in family law, and because we offer speakers that provide fresh perspectives. Year after year, Raising the Bar provides valuable knowledge to help us grow, and remain relevant within our ever changing field. The program this year is no exception. This year

we are bringing back the very popular advanced break-out sessions focusing on different areas of your trial practice including direct and cross examination and presenting evidence at trial. We also have a number of other exciting topics including preserving your appellate record, collaborative law, and business valuation and taxation. We have brought together some of the brightest minds in our legal community to help you elevate your game, adjust your perspective and become a better advocate. So join us on April 5, 2019, at the Bahia Mar for Raising the Bar. We hope to see you there! 



Ms. Matalon is an attorney with Boies Schiller Flexner LLP in Hollywood where she litigates a broad spectrum of family law cases. She is also co-chair of the BCBA Family Law Section.



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NO THANKS, GIVE ME A ZERO

(or what you might want to say if your client says they want to give you a gift)

by Mark R. Manceri

While this response may seem obvious to many, if not most lawyers, the conflict that arises when a client makes a gift to a lawyer in a Will or a Trust drafted by the lawyer appears with some degree of frequency. The conflict is rooted in the inherent and obvious confidential relationship that exists between a lawyer and a client. What is particularly alarming is that it seemingly most often occurs among the group of lawyers who, one would think, would be the most sensitive to it - the estate planners. Estate planners are, after all, in the business of assisting or advising clients who are making gifts, whether they be inter-vivos or testamentary gifts.

The cause for concern is not a client who decides to give a lawyer a bottle of wine or their favorite vodka or scotch as a holiday gift. While inter-vivos gifts by a client to a lawyer can also be problematic, the greater cause for concern is the scenario where the client is now deceased and the factual circumstances under which a testamentary gift was allegedly given to the lawyer by the client must be discovered and analyzed.

There are two areas of Florida law that set out what lawyers need to know and be fully aware of if a client wants to give them (or a close family member) a gift in a written

instrument prepared by the lawyer or the lawyer supervised the execution of the instrument. As you will see later, there can be a lot riding on how you handle the situation so this is not a place where you just want have an “idea” of what the law is. Caution is the guidepost.

The first is in the Probate Code - Florida Statute 732.806, titled “Gifts to lawyers and other disqualified persons”. The Statute became effective on July 1, 2013 and applies to written instruments executed on or after that date. The Statute is rather lengthy and too long to be included here. The Statute addresses the scenario where the lawyer prepared the written instrument that made the gift, supervised the execution of the written instrument that made the gift, or the lawyer solicited the gift.

What is clearly the most significant aspect of the Statute is that a gift to a lawyer or any person, under subsection (7)(b) of the Statute, defined as being “related” to the lawyer, is void. The size of the gift in the written instrument has no bearing. The Statute applies to any gift. Additionally, pursuant to subsection (3), the Statute cannot be waived. In other words, since the gift is void and the Statute cannot be waived it does not appear the client

can “fix” or “ratify” the gift later.

The only exception set out in the Statute is if the lawyer and the person making the gift are related. As a common example, a lawyer preparing a Will for a parent in which the lawyer is a named beneficiary. Beware of that scene for other reasons, such as allegations of undue influence by siblings or other members of your own family who are not too happy with your drafting of “what Mom wanted” when she left you a disproportionate share of her estate. It would only get worse if it winds up in a courtroom and you are a party rather than an advocate.

One other point regarding application of the Statute. Pursuant to subsection (2), it does not apply where the lawyer is named as a fiduciary in a written instrument prepared by the lawyer. Don’t think you are out from under the microscope in that situation because, as you will see later, fiduciary appointments are addressed elsewhere.

The second is in the Rules Regulating the Florida Bar. Specifically, Rule 4-1.8(c) which was amended on February 1, 2018. Subsection (c) now reads:

A lawyer is prohibited from soliciting any

gift from a client, including a testamentary gift, or preparing on behalf of a client an instrument giving the lawyer or person related to the lawyer any gift unless the lawyer or other recipient of the gift is related to client. For purposes of this subdivision, related persons include a spouse, child, grandchild, parent, grandparent, or other relative with whom the lawyer or the client maintains a close, familial relationship.

As can be seen, the amended Rule, like Florida Statute 732.806, also voids any gift by a client that the lawyer solicited or that is included in an instrument that the lawyer prepared. One noted difference from the Statute is that the amended Rule does not speak in terms of the lawyer “supervising” the execution of the instrument. Under the prior version of Rule 4-1.8(c), only “substantial” gifts were affected. The word “substantial” has been deleted. From a defense perspective, there is no longer the opportunity to debate or argue what is “substantial”. Like the Statute, the amended Rule also contains an exception for gifts by a client to related persons.

While violating Florida Statute 732.806 opens the lawyer up to the taxation of fees and costs under subsection (5), the per se violation of an ethical Rule is something different and in all likelihood, far more troubling. It is beyond the scope of this article.

The Comment to amended Rule 4-1.8, unlike Florida Statute 732.806, addresses the fact pattern where an instrument is prepared by a lawyer under which the client names the lawyer, the lawyer’s firm or a relative of the lawyer to a “fiduciary office”. This would include being named as a Personal Representative or Trustee. Such a fiduciary appointment can only be validly made if the client gives informed consent, which is confirmed in writing. Additionally, validity requires that the fiduciary appointment not violate Rule 4.1-7 dealing with conflicts and that it be free of undue influence or solicitation by the lawyer.

The Comment also reflects that the lawyer should advise the client, in writing, as to matters relating to who is eligible to serve as a fiduciary, that a fiduciary is entitled to compensation and that a lawyer can be compensated for serving as both a fiduciary and as the lawyer for the fiduciary.

As a drafting point, it might be wise to in-

clude the suggested language in separate writings signed by the client and the signed instrument itself in which the fiduciary(ies) are named.

There are cases pursued by the Florida Bar which serve as examples (there are many others) of what not to do. In *The Florida Bar v. Poe*, 786 So.2d 1164 (Fla. 2001) a lawyer prepared a Will under which the lawyer received \$15,000.00 and was named Personal Representative. The lawyer was disbarred. In *The Florida Bar v. Anderson*, 638 So.2d 29 (Fla. 1994) a 91 day suspension was given to a lawyer who drew a series of Wills for a client under which the lawyer or his spouse were named as a beneficiary.

From the perspective of undue influence, all lawyers who do any degree of estate planning should read *Rocke v. American Research Bureau (In Re: Estate of Murphy)*, 184 So.3d 1221 (Fla. 2nd DCA 2016).

Rocke tells the story of Virginia E. Murphy, who died at the age of 107. Her estate exceeded twelve (12) million dollars at the time of her death. She had no surviving family or close relatives. Her lawyer for many years prepared a series of six (6) Wills for her. The first in 1989 and the last in 1994. The attorney and his legal assistant were named as beneficiaries in all six Wills. The attorney was also named as the Personal Representative. The bequests to the attorney and his assistant ranged from \$50,000.00 each in the 1989 Will to several million dollars in the 1994 Will.

To no real surprise, the 1994 Will was contested by Mrs. Murphy’s second cousin who was a beneficiary under a prior Will. The second cousin alleged that the attorney and his assistant exerted undue influence over Mrs. Murphy. Ultimately, the Appellate Court struck the residuary gifts in the 1992 Will to the attorney and his assistant finding they were the product of undue influence. The second cousin inherited the residue of the estate.

In a footnote, the Court made the following observation (made under the prior version of Rule 4-1.8(c)):

We need not recount all of the probate court’s findings of undue influence—which were quite extensive—but would echo the court’s sense of puzzlement as to why Mr. Carey, an es-

teemed lawyer and a former city councilman, FBI agent, and Army Air Corps veteran, succumbed to the temptation to pursue a pecuniary windfall at the expense to a frail and susceptible client. Sadly, the pall of this case cast a long shadow over an otherwise exemplary professional reputation. Cf. Fla. R. Prof. Conduct 4-1.8(c) (“A lawyer shall not ... prepare on behalf of a client an instrument giving the lawyer ... any substantial gift unless the lawyer ... is related to the client.”). We make this observation not to impugn the memory of Mr. Carey, who passed away in 2014, but to state this simple point: **the repercussions from a single ethical lapse may carry far beyond a lawyer’s license to practice law.** (emphasis added).

While a client can give a gift to a lawyer or a member of the lawyer’s family, it needs to be done by an independent lawyer of the client’s choosing. This would seem to require that the recipient lawyer have virtually no involvement or knowledge regarding the gift to be made by the client.

As for me, no thanks, give me a zero. **B**



Mark R. Manceri, Esq. was admitted to the Florida Bar in 1984 and has been Florida Bar Board Certified in Wills, Trusts and Estates since 1991. He specializes in litigating all types of related adversarial proceedings. Mark R. Manceri, P.A., 1600 South Federal Highway, Suite 900, Pompano Beach, Florida 33062. Telephone: 954-491-7099. email: mrmlaw@comcast.net. website: estateprobatelitigation.com

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Homelessness Is Not a Crime

by Barry Somerstein

When it comes to discussing homelessness in Broward County, many people ask, “isn’t it illegal to camp out on the streets?” The answer is, quite simply: homelessness is not a crime. Further, numerous studies have shown that passing laws aimed at criminalizing homelessness is costly and ineffective.

Ironically, arresting violators of laws targeting homeless activities turns them into criminals and subjects them to jail time and fines they can’t pay—inviting re-arrests. Criminal records reinforce the stubborn myth that people experiencing homelessness are by nature dangerous, though the truth is they’re far more likely to be victims of violence than its perpetrators. And, of course, having a criminal record makes finding employment that much more difficult.

Humane legal measures that aim to help those experiencing homelessness receive critical services—from shelter to food to medical care—are the only proven methods to eradicate homelessness, and they require a broad-based community effort that addresses social issues at the core. That’s why the Greater Fort Lauderdale Alliance, of which I am a member, has teamed up with United Way of Broward County to create the Broward Business Council on Homelessness. These organizations are collaborating with Broward County, City of Fort Lauderdale and other municipalities and partners to address the core issues and help ameliorate homelessness in our community.

This partnership is known as the Homelessness Collaborative in Broward County and has adopted the “Housing First” model—a humane, comprehensive solution that attempts to take peo-


ple out of the vicious cycle of chronic homelessness, arrests and/or hospitalizations. Proven successful in many other communities, “Housing First” gets those experiencing homelessness into their own housing and then addresses their mental and medical health care needs. In Orlando, this approach reduced homelessness by more than 60 percent in just three years. During the same period, the cost of public services per person experiencing homelessness dropped from over \$32,000 a year to approximately \$18,000 a year.

The Homelessness Collaborative in Broward County started its work by addressing residents of the downtown Fort Lauderdale encampment at the Broward Main Library. Over several months, case managers visited and interviewed all of those in the encampment, evaluating their physical and emotional needs and devising individualized plans to bring them out of homelessness. The “Home for the Holidays” initiative then reached a major milestone during the last week of November 2018, when all 80 individuals moved out of the encampment—along with their pets and belongings—and 41 tents were removed with owner approval. Three individuals were reunited with family outside Florida. The vast majority of households were deemed eligible for some form of permanent housing, and the remainder were placed in shelters while case managers continued to work on permanent housing solutions for them. All of those who wanted additional services were offered them.

The closing of the downtown encampment was an important step for all involved, but the work is far from over. As the Homelessness Collaborative’s

partners seek, among other things, landlords willing to rent to them, philanthropy for furnishings, and supplies and employment opportunities for the newly housed, it is important to remember: the encampment is just a tiny fraction of Broward’s homeless population. At least 2,300 individuals are experiencing homelessness every day in Broward County, including more than 300 children. Sadly, the number of homeless 18-year-olds continues to increase, with most coming from foster care. In fact, 12 percent of persons experiencing homelessness have just transitioned out of foster care.

As members of Broward’s legal community, it’s our obligation to see that justice is served for all involved. In this case, justice comes in the form of a humane, socially responsible solution that protects quality of life in our community while preserving the dignity of those experiencing homelessness.

If you would like to assist us in our efforts, please visit UnitedWeEndHomelessness.org or Broward.org/EndHomelessness. 



Barry E. Somerstein, partner at Greenspoon Marder LLP, concentrates his practice in the areas of real estate transactional law, finance, leasing, general corporate sports law and land use.



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Case Law Update

by Debra P. Klauber

Florida Supreme Court rejects challenge to proposal for settlement. The Florida Supreme Court accepted review to address the question of whether proposals for settlement, which are served on the opposing party, but not filed with the court, must comply with the email service provisions set forth in the Rules of Judicial Administration. Because a proposal for settlement is not a document that is “required” to be filed with the court, it is not subject to the more stringent rules governing the format of the service email. The court seems to be swinging in favor of substance over form, reaffirming its prior finding that procedural rules should “no more be allowed to trump the statute... than the tail should be allowed to wag the dog.” *Wheaton v. Wheaton*, SC17-716, 44 Fla. L. Weekly S94 (Fla. Jan. 4, 2019).

Fifth District releases two new decisions addressing presuit requirements, namely the requirement that presuit experts be engaged in the “same specialty.” The appellate court dismissed plaintiffs’ claims against certain healthcare providers in this recent pair of decisions where the presuit experts were not engaged in the same specialty as the prospective defendants. In one, the plaintiff provided a presuit expert report from a plastic surgeon to criticize the medical care provided by an orthopedic surgeon. In the other, the plaintiff relied upon affidavits from an emergency room physician, a radiologist and a nurse, who expressed criticisms about the care rendered by, again, an orthopedic surgeon. Following earlier decisions holding that “same specialty” should be taken literally, and is not synonymous with physicians with different specialties providing similar treatment to the same areas of the body, the court refused to allow these medical malpractice claims to proceed. Interestingly, it appears that neither of the plaintiffs timely raised the constitutionality of the statute, notwithstanding the Florida Supreme Court’s recent refusal to adopt the “same specialty” language to the extent that it is procedural. *Riggenbach*

v. Rhodes, 5D18-1889, 44 Fla. L. Weekly D296 (Fla. 5th DCA Jan. 25, 2019); *Davis v. Karr*, 5D18-149, 44 Fla. L. Weekly D298 (Fla. 5th DCA Jan. 25, 2019).

Fourth District affirms trial court order finding that insurance carrier did not have standing to sue law firm hired to defend insured. In what appears to be a case of first impression in the Florida courts, the Fourth District held that an insurance company was not in privity with the law firm it hired to defend its insured and, thus, did not have standing to pursue a legal malpractice claim. The insurer alleged that the law firm’s delayed filing of a statute of limitations defense resulted in a large settlement that the insurer was required to pay. However, since the insurance company was not in privity with the law firm, and was not an intended third-party beneficiary of that relationship, the court was not persuaded by other federal case law or the insurer’s public policy argument and ultimately held that the insurer lacked standing to pursue a professional negligence claim against the law firm. *Arch Ins. Co. v. Kubicki Draper, LLP*, 4D17-2889, 44 Fla. L. Weekly D269 (Fla. 4th DCA Jan. 23, 2019).

Second District addresses prevailing party attorneys’ fees. In cases involving contracts that allow for the prevailing party to recover its fees, Florida law generally holds that the party prevailing on “the significant issues in the litigation” is the one entitled to those fees. In this case, which involved a covenant not to compete and a covenant not to solicit customers, the trial court narrowed the relief sought by the former employer and thus refused an award of fees. The appellate court reversed, finding that since the employer successfully obtained an injunction for the time period and geographic area requested, and since the trial court had rejected the employee’s arguments, the employer had prevailed on the significant issues and was entitled to fees. *EHRM Orthopedics, Inc. v. Edwards*, 2D18-924, 44 Fla. L. Weekly D174

(Fla. 2d DCA Jan. 4, 2019).

Supreme Court confronts the question of whether the rules allow a party to include, as a taxable cost, amounts paid to a fact witness. In certain circumstances, the Rules Regulating the Florida Bar (4-3.4) do allow parties to compensate fact witnesses (i.e., preparing for, attending, and testifying at proceedings, for loss of compensation while testifying, and for professional services). The Florida Supreme Court found that this issue should be addressed from a “narrow lens” and held that a witness who provides assistance directly related to his or her “preparing for, attending, or testifying at proceedings” can be compensated and, in turn, the amount can be included as a taxable cost. The court provided the following examples that might properly be included: reviewing correspondence and assisting with filling out interrogatories related to matters within the witness’ knowledge, and time spent executing affidavits. The court also held that other activities would go beyond the scope of the rule, i.e., time spent reviewing legal motions. The ruling seems to require a line-by-line analysis of such payments. Payments to fact witnesses involve a slippery slope and the court made sure to caution litigants, noting the continued importance of avoiding even the appearance of improper influence in this context. *Trial Practices, Inc. v. Hahn Loeser & Parks, LLP*, SC17-2058, 44 Fla. L. Weekly S56 (Fla. Dec. 28, 2018). **B**



Debra P. Klauber, Esq., a partner with Haliczzer Pettis & Schwamm, oversees the firm’s trial support and appellate practice and provides guidance to litigators throughout Florida. Debbie can be reached at 954-523-9922 or dklauber@hpslegal.com.

Broward Clerk of the Courts Automating Work Faster and More Easily with Automation

By: *Brenda D. Forman, Broward County Clerk of Courts & Ernie Nardo, Chief Technology Officer*

Automating the E-Filing Process with Robotic Process Automation

The Broward Clerk of the Courts is exploring the potential of artificial intelligence (AI) and robotic process automation (RPA) to streamline routine, repetitive and manual business processes to maximize productivity and efficiency in the courthouse. The office currently processes approximately twenty percent of all electronically filed documents automatically without human intervention. The promise of automating the majority of electronically-filed records to drive down operating costs and align middle- or back-office operations to improve customer experiences and business process efficiently has boosted the AI/RPA project as a top priority for the Clerk's office. The next step is to identify e-filing business processes best suited for robotic process automation.

During the next twelve to eighteen months the office plans to focus its energies on identifying the business process best suited for automation with AI/RPA and creating a realistic estimate of impact for each process. This will enable the office to identify the right business stakeholders to engage, with a tailored, measurable, and more realistic statement of benefit before taking on the initiative.

Electronic Courtroom

The Clerk's office will be implementing the ability to provide dispositions directly within the courtroom. These solutions enable clerks to rapidly access and enter critical data right in the courtroom, automating tasks and streamlining processes. Creation and routing of court orders and forms, such as hearing notices can occur, prior to leaving court. The Clerk's office has chosen a solution that is specifically for high-volume courtrooms and

integrates directly, in real-time, with the current Case Management system.

Upcoming Online eServices

Commercial Data Access – eReports

eReports is an upcoming online eService that will allow users to create real-time download reports including the ability to customize the report at run time. This service will allow the backward compatibility to the legacy "Report Downloads" featured on the legacy website. Users will be able to save their preference criteria and re-run already existing reports or schedule a report to run at a specific date and time.

Existing Online eServices

The following Broward County Clerk of Court online eServices provides advanced and convenient access to court case information filed in the 17th Judicial Circuit. By simply creating an online account you may subscribe to any one of the online eServices offered. While some services are free to use, others may require fees to cover the cost of providing the service.

Electronic Certified Court Documents


The Broward County Clerk of the Courts offers **Electronic Certified Court Documents** for purchase on the Clerk's website. Each electronic certified document uses advanced encrypted features to produce a tamper proof electronic certified document that includes a unique Clerk of Court digital signature.

This service offers a fast, easy and convenient method for purchasing electronically certified court documents online. Only recently filed Electronic certified court documents are available for pur-

chase on the Clerk's website. If the case and/or document you are looking for is not available for viewing on the Clerk of Courts website, you may submit a Court Records Request to the Archives division, or contact the appropriate Clerk of Court Location to order, purchase or view copies of paper court records.

eTrack

eTrack is a case tracking service which enables you to track Civil, Family, Probate, Felony, Traffic and Misdemeanor cases filed in the 17th Judicial Circuit. Tracking cases will allow you to receive real-time "Case Notifications" and "Hearing Reminders" by email. Case Notifications are sent twice a day, at 8:00 AM and 4:00 PM. Hearing Reminders are sent once a day at 6:00 AM.

For questions relating to online services send an email to PublicAccessHelpDesk@browardclerk.org. 



Brenda D. Forman and Ernie Nardo

2 Guardianship Class - 8 Hour Adult
Time: 9:00 a.m. – 5:00 p.m.
Venue: BCBA Conference Center
Cost: \$180; No Walk-ins accepted

8 International Women’s Day: A Celebration of Women in the Legal Community “Broward’s Women Pioneers”
Time: 8:30 a.m. – 11:00 a.m.
Venue: Broward County Courthouse - Jury Assembly Room (#03320)

8 The Investiture of The Honorable Stefanie C. Moon
Time: 1:30 p.m.
Venue: Broward County Courthouse - Jury Assembly Room (#03320)

9 Guardianship Class-4 hr Minor
Time: 9:00 a.m. – 1:00 p.m.
Venue: BCBA Conference Center
Cost: \$100; No Walk-ins accepted

12 Wills, Trusts, and Estates CLE: Best of Heckerling 2019 “The Laws, They Are A-Changin’”
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: \$20 BCBA Member; \$30 Non-Member

13 Trial CLE: Look Like a Million Bucks, Without Spending It!
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: \$20 BCBA Member; \$30 Non-Member

13 After 5 - Legal Jam
Time: 6:00 p.m. – 8:00 p.m.
**Musicians can start set-up at 5:00 p.m.*
Venue: Stache Drinking Den + Coffee Bar
No Cost

14 BCBA Mentorship - Mentee Orientation CLE
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: \$15 BCBA Mentees - Event is for BCBA Members interested in being Mentees

15 YLS Lawyers for Literacy
Time: 8:30 a.m.
Venue: Rock Island Elementary
Volunteers Needed!

15 Judicial Jaunt Series: The Honorable Sandra Perlman
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: \$20 BCBA Member; \$30 Non-Member

20 Solo Small Networking Dinner
Time: 6:00 p.m. – 8:00 p.m.
Venue: Dave & Buster’s Hollywood
Cost: \$40 BCBA Member; \$55 Non-Member
**\$5 price increase on 3/13/2019*

20 Elder Law CLE
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: \$20 BCBA Member; \$30 Non-Member

21 YLS Luncheon: Beyond Leaning In
Time: 12:00 p.m. – 1:30 p.m.
Venue: BCBA Conference Center
Cost: \$20 BCBA Members; \$25 Non-Members

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May 3, 2019
2019 Law Day Luncheon

June 22, 2019
2019 Annual Installation Gala Dinner

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